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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75–159

RICHARD RALPH RILEY, *Petitioner,*

v.

STATE OF NEVADA, *Respondent.*

On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Las Vegas, Nevada 89101

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SUBJECT INDEX

PAGE

OPINION BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 2

ARGUMENT—

I. Petitioner has not established that the Nevada district court violated his fundamental rights when said court failed to ascertain whether withdrawal of a guilty plea was knowing and voluntary 2

II. Petitioner has failed to invoke and exhaust an appropriate remedy provided by the State of Nevada 3

III. The record as presently constituted does not afford a factual basis sufficient to raise a federal question 4

CONCLUSION 5

INDEX TO EXHIBITS

Exhibit A. NRS 177.315 et seq 6

TABLE OF AUTHORITIES CITED

CASES — PAGE

Boykin v. Alabama, 395 U.S. 238 (1969) 2
Case v. Nebraska, 381 U.S. 336 (1965) 3
Ellis v. Dixon, 349 U.S. 458 (1955) 5
Fay v. Noia, 372 U.S. 391 (1963) 3
Jones v. Davis, 336 F.2d 594 (6th Cir. 1964) 4
Marino v. Ragen, 332 U.S. 561 (1947) 3
Morehead v. State of California, 339 F.2d 170 (9th Cir. 1964) ... 4
People v. Shapiro, 3 N.Y.2d 203 (1957) 3
Phyle v. Duffy, 334 U.S. 431 (1948) 5
Reynolds v. Lockhart, 497 F.2d 314 (8th Cir. 1974) 4
Smithart v. State, 86 Nev. 925, 478 P.2d 576 (1970) 4
Taylor v. Beto, 392 F.2d 566 (5th Cir. 1968) 5
Townsend v. Sain, 372 U.S. 393 (1963) 3
United States ex rel. Darcy v. Handy, 351 U.S. 454 (1956) 4
United States ex rel. Waldron v. Pate, 380 F.2d 94 (7th Cir. 1967), cert. den. 389 U.S. 1054 5
United States v. Stayton, 408 F.2d 559 (3d Cir. 1969) 3
United States v. Thomas, 415 F.2d 1216 (9th Cir. 1969) 3
Young v. Ragen, 337 U.S. 235 (1949) 4

STATUTES

28 USC § 1257(3) 1
28 USC § 2245 3

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner seeks review by certiorari of the judgment and opinion of the Nevada Supreme Court entered in the case above on March 27, 1975, and its order denying rehearing on April 30, 1975.

OPINION BELOW

The opinion of the Supreme Court of the State of Nevada (Exhibit "A" of petition) is reported at 91 Nevada Advance Opinion 64. The order of that court denying rehearing appears as Exhibit "B" of petition, and was entered April 30, 1975.

JURISDICTION

Petitioner has invoked jurisdiction of this Court under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Were fundamental rights of the petitioner violated when the Nevada district court failed to ascertain whether withdrawal of a guilty plea was knowing and voluntary?

2. Has petitioner failed to invoke and exhaust an appropriate remedy provided by the State of Nevada?

3. Does the record of the case as presently constituted afford a factual basis sufficient to raise a federal question?

STATEMENT OF THE CASE

On June 1, 1972, petitioner kidnapped Armenta Reinoehl, forcing her to perform oral copulation upon him, then raping and robbing her. Pursuant to plea negotiations with the Clark County District Attorney, petitioner agreed to plead guilty to a charge of rape in return for dismissal of charges of infamous crime against nature, robbery, and kidnapping. Having entered such plea, he later sought and was granted permission to withdraw it and enter a plea of not guilty. Petitioner asserts that his attorney failed to inform him of the possible consequences of such action, and further contends that the court erred in permitting him to enter the plea of not guilty without ascertaining whether it was knowingly made.

ARGUMENT

I.

PETITIONER HAS NOT ESTABLISHED THAT THE NEVADA DISTRICT COURT VIOLATED HIS FUNDAMENTAL RIGHTS WHEN SAID COURT FAILED TO ASCERTAIN WHETHER WITHDRAWAL OF A GUILTY PLEA WAS KNOWING AND VOLUNTARY.

A duty exists for trial judges to question defendants with regard to the knowledgeability and voluntariness of a guilty plea. *Boykin v. Alabama*, 395 U.S. 238 (1969). Under certain circumstances,

guilty pleas may be withdrawn and pleas of not guilty entered. *United States v. Stayton*, 408 F.2d 559 (3d Cir. 1969); *United States v. Thomas*, 415 F.2d 1216 (9th Cir. 1969). However, there appears to be no basis for petitioner's claim that upon being permitted to *withdraw* a plea of guilty, a defendant must be questioned as to his understanding of possible penalties should he later be convicted. This is noted by the Nevada Supreme Court in its ruling below at 91 Nevada Advance Opinion 64 (1975). Further, petitioner cites no authority in support of said claim. No federal question has been raised.

II.

PETITIONER HAS FAILED TO INVOKE AND EXHAUST AN APPROPRIATE REMEDY PROVIDED BY THE STATE OF NEVADA.

In *Case v. Nebraska*, 381 U.S. 336 (1965), Justice Brennan in a concurring opinion called for development of effective state post-conviction procedures, and argued that, should the states assume this burden, the exhaustion requirement of 28 U.S.C. § 2245 would clearly promote state primacy in the implementation of the guarantees of fair and just criminal procedure.

Prior to *Case*, this Court had expressed concern regarding what seemed to be the willingness of the states to refuse post-conviction relief on strict procedural bases. One such basis was the election of an improper remedy, and another was the problem of waiver in critical situations. *Marino v. Ragen*, 332 U.S. 561 (1947); *Fay v. Noia*, 372 U.S. 391 (1963). State Supreme Courts decried the fact that no clear rules existed for the granting of post-conviction relief. *People v. Shapiro*, 3 N.Y.2d 203 (1957).

Following *Case*, supra, and adopting guidelines for evidentiary hearings set out in *Townsend v. Sain*, 372 U.S. 293 (1963), many states have enacted statutes designed to afford post-conviction relief. One such statute is Nevada Revised Statutes

177.315 et seq., a copy of which is appended hereto as Exhibit "A". Petitioner has not invoked the relief afforded under said statute. It cannot be argued convincingly that state relief is ineffective where no attempt has been made to invoke it. *Morehead v. State of California*, 339 F.2d 170 (9th Cir. 1964); *Jones v. Davis*, 336 F.2d 594 (6th Cir. 1964); *United States ex rel. Darcy v. Handy*, 351 U.S. 454 (1956). In exhausting state remedies, one must invoke said remedies unless needless duplication would result, or to do so would be clearly futile. *Reynolds v. Lockhart*, 497 F.2d 314 (8th Cir. 1974). Where a state affords procedures through which a federal claim may be raised, such procedures should be utilized. *Young v. Ragen*, 337 U.S. 235 (1949). Hence, petitioner's proper remedy at this point is to avail himself of the post-conviction relief statute afforded by the State of Nevada, rather than to invoke the jurisdiction of the federal judiciary.

III.

THE RECORD AS PRESENTLY CONSTITUTED DOES NOT AFFORD A FACTUAL BASIS SUFFICIENT TO RAISE A FEDERAL QUESTION.

Petitioner complains that the Nevada Supreme Court, in hearing his appeal, failed to consider his contention that he was deprived of effective representation by his counsel, who allegedly failed to inform him of the true nature of a possible penalty he faced. Such fact is not developed within the record of this case as it now appears. It amounts to nothing more than a bare allegation by petitioner. This question was never properly before the Nevada Supreme Court, for that court has held that it will not consider contentions outside the record before it. *Smithart v. State*, 86 Nev. 925, 478 P.2d 576 (1970). In a similar case, it has been held that review of the record for trial error, and the affirmance of conviction and sentence by the Illinois Supreme Court did not constitute an implied adjudication of an issue as to whether a petitioner

was denied effective assistance of counsel on his appeal, and did not exhaust state remedies as to that issue. *United States ex rel. Waldron v. Pate*, 380 F.2d 94 (7th Cir. 1967), cert. den. 389 U.S. 1054.

Further, this Court has often refused to decide constitutional questions based upon an inadequate record. *Ellis v. Dixon*, 349 U.S. 458 (1955). It has also held that certiorari does not lie to determine whether a petitioner has been deprived of due process of law where he has not invoked a state remedy afforded him for the determination of such matters. *Phyle v. Duffy*, 334 U.S. 431 (1948).

Under the facts now before this Court, petitioner has raised a claim which is properly the subject of an evidentiary hearing. The claim was not developed on the record before the trial court, nor could it reasonably have been. Provision is made for such a hearing by Nevada statutes, and the proper forum for initial exploration of the issue is such an evidentiary hearing in the state trial court. *Taylor v. Beto*, 392 F.2d 566 (5th Cir. 1968).

Absent such a hearing, there is inadequate basis in fact to support the raising of a federal question.

CONCLUSION

The petition for writ of certiorari should be denied. Petitioner has failed to show the existence of a substantial federal question.

DATED this 28th day of August, 1975.

ROBERT LIST
Attorney General of Nevada

THOMAS D. BEATTY
Assistant District Attorney
Clark County, Nevada

EXHIBIT "A"

POST–CONVICTION PROCEDURE

177.315 Remedy: To whom available; conditions.

1. Any person convicted of a crime and under sentence of death or imprisonment in the state prison who claims that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the constitution of this state may, without paying a filing fee, apply for post-conviction relief from the conviction or sentence.

2. The remedy herein provided is not a substitute for nor does it affect any remedies which are incident to the proceedings in the trial court, the remedy of direct review of the sentence or conviction or the writ of habeas corpus, except that if a writ of habeas corpus is used to attack a conviction or sentence, such remedy is not available. It comprehends and takes the place of all other common law, statutory or other remedies which have heretofore been available for challenging the validity of the conviction or sentence, and shall be used exclusively in place of them.

3. Unless there is good cause shown for delay, a proceeding under NRS 177.315 to 177.385, inclusive, shall be filed within 1 year following entry of judgment of conviction or, if an appeal has been taken from such judgment, within 1 year from the final decision upon or pursuant to the appeal.

(Added to NRS by 1967, 1447; A 1969, 106; 1973, 436)

177.320 Limitation on district court's jurisdiction to grant relief. The jurisdiction of the district court in post-conviction relief hearings to find in favor of a petitioner is limited to those cases in which the court finds that there has been a specific denial of the petitioner's constitutional rights with respect to his conviction or sentence.

(Added to NRS by 1973, 439)

177.325 Commencement of proceedings: Verification; filing; service. The proceeding is commenced by filing a petition verified by the petitioner with the clerk of the court in which the conviction took place. The clerk shall docket the petition upon its receipt and promptly bring it to the attention of the court and deliver a copy to the district attorney.

(Added to NRS by 1967, 1447; A 1973, 436)

177.335 Petition: Contents and limitation of grounds. The petition shall identify the proceedings in which the petitioner was convicted, give the date of the entry of the final judgment complained of

and clearly set forth the respects in which the petitioner's constitutional rights were violated. Affidavits, records or other evidence supporting its allegations shall be attached to the petition unless the petition recites why they are not attached. The petition shall identify any previous state or federal court proceedings taken by the petitioner to secure relief from his conviction or sentence. Argument, citations and discussion of authorities are unnecessary.

(Added to NRS by 1967, 1448; A 1969, 107; 1973, 436)

177.345 Inability to pay costs.

1. The petition may allege that the petitioner is unable to pay the costs of the proceeding or to employ counsel. If the court is satisfied that the allegation is true, it shall appoint counsel for him within 10 days of the filing of the petition.

2. If inability to pay is determined, all necessary costs and expense incident to the proceedings in the trial court and in the reviewing court, including all court costs, stenographic services, printing and reasonable compensation for legal services, shall be paid from funds appropriated to the office of state public defender, but after the appropriation for such purpose is exhausted, moneys shall be allocated to the office of state public defender from the reserve for statutory contingency fund for the payment of such costs, expenses and compensation.

(Added to NRS by 1967, 1448; A 1969, 107; 1973, 169, 437)

177.355 Pleadings.

1. Within 50 days after the filing of the petition the petitioner's attorney, if any, may file a supplemental petition on behalf of the petitioner and shall notify the state whether such petition is filed or not.

2. Within 40 days after such notification, if applicable, or within 90 days after the filing of the petition, the state shall respond by answer or motion to dismiss.

3. No further pleadings may be filed except as the court orders.

(Added to NRS by 1967, 1448; A 1973, 437)

177.365 Hearings; evidence; order.

1. The petition shall be heard in, and, if reasonably available, before the same judge of, the court in which the conviction took place. A record of the proceedings shall be made and kept. The court may receive proof by affidavits, depositions, oral testimony or other evidence and, if the petition presents a constitutional question of law, may order the petitioner brought before it for the hearing. If the petition presents a constitutional question of fact, the court shall order the petitioner brought before it for the hearing.

2. Following a hearing on the petition, the court shall make specific findings of fact, expressly state its conclusions of law and set forth its judgment.

3. If the court finds for the state on a motion to dismiss, a hearing is not necessary, and a short order form of judgment is sufficient.

(Added to NRS by 1967, 1449; A 1973, 438)

177.375 Waiver of claims.

1. If the petitioner's conviction was upon a plea of guilty, all claims for post-conviction relief are waived except the claim that the plea was involuntarily entered.

2. If the petitioner's conviction was the result of a trial, all claims for post-conviction relief are waived which were or could have been:

(a) Presented to the trial court;

(b) Raised in a prior petition for post-conviction relief; or raised in any other proceeding that the petitioner has taken to secure relief from his conviction or sentence,

unless the court finds good cause shown for the failure to present such claims.

(Added to NRS by 1967, 1449; A 1969, 108; 1973, 438)

177.385 Review. A final judgment entered on an application for post-conviction relief may be reviewed by the supreme court of this state on appeal, brought either by the petitioner or by the state as provided by law.

(Added to NRS by 1967, 1449; A 1969, 108)